SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

VAN SCOYOC ASSOCIATES, INC.	)	
	)	
Plaintiff,	)	Civil Action No. 99ca006989
	)	
v.	)	Calendar #9
	)	
ERNST & YOUNG, LLP	)	Judge Stephanie Duncan-Peters
	)	
Defendant.	)	Next Scheduled Event: Pretrial
	)	Conference (December 14, 2001)
	)	

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT ERNST & YOUNG, LLP'S MOTION FOR SUMMARY JUDGMENT

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Although plaintiff understandably seeks to portray this case as "fact-intensive" (Opp. 22), and our motion as "one long closing argument" (Opp. 2), there actually are no *material* facts in dispute. It is now abundantly clear that, as to both remaining claims in this case, plaintiff is missing key pieces of proof, without which there is simply nothing for a jury to decide. Plaintiff doesn't and never will have evidence (from an expert or otherwise) of an industry standard – and thus its negligence case must fail. Plaintiff doesn't and never will have evidence that E&Y played any role other than auditor in this transaction, and (in any event) the roles of "financial consultant" and "due diligence performer" do not give rise to a fiduciary duty – least of all to the *target* of the due diligence (as opposed to the *beneficiary* of the due diligence). Plaintiff doesn't and never will have evidence that, had E&Y disclosed its putative conflict, Phil Moseley would have remained at VSA and, indeed, stayed there for three more years – and thus its demand for "Moseley damages" (on both causes of action) must fail.

Permitting VSA to place this jerry-built lawsuit before a jury is simply unwarranted.

I. WHETHER LABELED A "NEGLIGENT MISREPRESENTATION" CASE OR AN "ACCOUNTANT'S MALPRACTICE" CASE, VSA MUST OFFER PROOF OF INDUSTRY-WIDE PRACTICES – AND, BY ITS OWN ADMISSION, IT HAS NO SUCH EVIDENCE TO OFFER

VSA makes two critical concessions that compel summary judgment on its negligent misrepresentation claim:

- *First*, VSA nowhere disputes that, in order to prevail on a professional negligence claim, a plaintiff must produce evidence of a national standard of care based on industry practices. See, *e.g.*, *Travers* v. *District of Columbia*, 672 A.2d 566, 568 (D.C. 1996); *Bell* v. *Jones*, 523 A.2d 982, 987-988 (D.C. 1987).

- *Second*, VSA points to no such evidence – because there is none – expert or otherwise, in the record of this case.

The law is clear that summary judgment is warranted where a plaintiff in a professional negligence

action "present[s] *no evidence whatever*, either expert testimony or any other form of proof, to establish what the standard of care was." *Woldeamanuel* v. *Georgetown University Hosp.*, 703 A.2d 1243, 1245 (D.C. 1997) (emphasis in original). VSA's only answer is that a "negligent misrepresentation" claim against a professional is not subject to the same evidentiary standards as a "malpractice" claim. But that is just plain wrong – and VSA offers no example of any court that has adopted its eccentric view of the law.

A. A Negligence-Based Claim Arising Out Of The Performance Of Professional Services Is A Professional Negligence Or Malpractice Claim

VSA urges this Court to disregard settled law governing the burden of proof in professional malpractice cases by arguing – for the first time – that this is not such a case. But how can that be? E&Y is an accounting firm and this case concerns its services in connection with a professional engagement. Throughout this litigation, VSA has always claimed that it was E&Y's audit client and that E&Y violated rules of the accounting profession promulgated by the American Institute of Certified Public Accountants. Indeed, in its recently filed Amended Complaint, VSA alleges that:

- "The partners and employees *performing the professional services* for Cassidy and VSA negligently *failed to inform their clients* of E&Y's solicitation of Moseley." Am. Cplt. ¶ 58 (emphasis added).
- "E&Y negligently failed to have in place a system whereby *the partners and/or employees providing services* to Cassidy and VSA would have been notified by the firm that other partners were soliciting Moseley." Am. Cplt. ¶ 60 (emphasis added).

Because these alleged misdeeds "arise[] out of a relationship between a layman and a professional and [are] directly attributable to the professional care, treatment, advice, representation, services, or conduct," *Sisters of Mercy* v. *Gaudreau, Inc.*, 423 A.2d 585, 585 (Md. Ct. App. 1980), this is a professional negligence or malpractice case. VSA is therefore required to prove that the

duties it believes that E&Y violated are, in fact, duties imposed by the accounting profession. See, *e.g.*, *Bell*, 523 A.2d at 987 (professionals must exercise "degree of care and skill" exercised by professionals in same field under similar circumstances); *Kemmerlin* v. *Wingate*, 261 S.E.2d 50, 51 (S.C. 1979) (applying that standard to accountants).

Because VSA's proof is fatally deficient, it argues that a negligent misrepresentation claim, as defined by Section 552 of the Restatement (Second) of Torts, sets a different standard – that of ordinary care without any reference to the "practices and the ethics of a particular profession." Opp. 4. That is simply not right, as the authors of Section 552 made explicit: a defendant "must exercise the competence reasonably expected of one in his business or professional position." Rest. § 552 *comment f*; accord Rest. § 552 *comment e*; *Dickerson Internationale, Inc.* v. *Klockner*, 743 N.E.2d 984, 988 (Ohio Ct. App. 2000) (negligent misrepresentation claim requires evidence of standard of care applicable to defendant's "business or profession") (*citing* Rest. § 552 *comment e*); see also *Greycas, Inc.* v. *Proud*, 826 F.2d 1560, 1563 (7th Cir. 1987) ("Legal malpractice based on a false representation, and negligent misrepresentation by a lawyer, are such similar legal concepts."); *Astor Chauffeured Limousine Co.* v. *Runnfeldt Investment Corp.*, 1988 WL 101267, at *6 (N.D. Ill. Sept. 23, 1988) (if defendant "had no duty of care to plaintiffs, the breach of which would constitute legal malpractice * * * it follow[ed] then that [defendant] had no duty of care to plaintiffs, the breach of which would constitute negligent misrepresentation").

How could the law be otherwise? If VSA's argument were adopted, clients suing professional service providers (whose services by nature involve representations to clients) would only have to place the title "negligent misrepresentation" on their claims to avoid the well-settled rule that a professional defendant must comply with duties grounded in his or her profession. VSA's omission

of the word "malpractice" from its complaint does not alter the underlying circumstances of the case. E&Y is a professional accounting firm and its performance of professional services gave rise to this action. See Am. Cplt. ¶¶ 58, 60. Consequently, whether E&Y owed a duty to VSA to act as VSA says E&Y should have acted must be determined by reference to the standards of the accounting profession.

B. VSA Concedes That It Will *Not* Offer Expert Testimony Establishing An Industry-Wide Practice

The plaintiff in a negligence case bears the burden of establishing the applicable standard of care. See, *e.g.*, *Bell*, 523 A.2d at 987. Because professional negligence cases invariably involve specialized industry standards, expert testimony is required to establish the standard of care. *Hodge* v. *District of Columbia Housing Fin. Agency*, 1993 WL 433601, at *1 (D.D.C. Oct. 15, 1993) (accounting malpractice case requiring expert testimony); *O'Neil* v. *Bergan*, 452 A.2d 337, 341 (D.C. 1982); *Dickerson Internationale*, 743 N.E.2d at 988 (requiring expert testimony to establish standard of care in negligent misrepresentation case).

This Court has explained that VSA's claims turn on "whether or not E&Y should have had a system in place to guard against such conflicts of interests and whether or not E&Y had a duty to notify VSA that they were in employment negotiations with Moseley." 10/13/00 Order at 3.[1] See also Am. Cplt. ¶¶ 57-58, 60. VSA has conceded that expert testimony is necessary to explain whether E&Y had such duties – not by way of a typographical error as it tries to explain (Opp. 5 n.2) but in explicit terms: "the description of which ethics rules apply to accountants, why those rules

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[1] This Court has *not* said, as VSA suggests (Opp. 3), that VSA's negligence claim is immune from attack on its legal sufficiency. The Court merely gave VSA leave to replead its claim as one sounding in negligence instead of fraud.

apply, the content of the rules, and interpretation of the rules are ones well beyond the common experience of most laypersons, or even most professionals." Plaintiff's Opposition to Defendant's Motion to Preclude Expert Testimony of Dan M. Guy, at 3-4. We note that this Court has also suggested that VSA needs expert testimony to support its claim. See Order Denying E&Y's Motion To Preclude Expert Testimony Of Dan M. Guy, at n.1.

But, as we explained in our opening memorandum (at 5), just any expert testimony will not suffice. The expert must determine that the defendant failed to comply with practices followed in the relevant industry. See, *e.g.*, *Travers*, 672 A.2d at 568-569; *District of Columbia* v. *Arnold & Porter*, 756 A.2d 427, 433 (D.C. 2000). VSA offers no contrary legal authorities in response. Nor, critically, does it claim to have *any evidence that would establish the relevant industry practices*. See Opp. 7-10 (nowhere referring to evidence of industry practices). Indeed, it could not make such a claim because its expert admitted that he has no knowledge of industry practices. Guy Tr. 191-194; see also *id.* at 106-108 (admitting that his opinion was based not on precedent but on his "personal" opinion).

Lacking the legally required foundation for its negligence claim, VSA retreats to the familiar redoubt of "trusting the jury." Opp. 5-6. But trust is not the question – respect for the proper roles of the Court and the jury is. Surely the jury could determine how much or what type of effort would have been required for the E&Y auditors to discover and then inform VSA that E&Y's tax practice was talking to Moseley. But whether there is a sufficient basis for imposing those duties on E&Y is, in the first instance, a matter solely for the Court to decide. Because VSA offers *none* of the requisite evidence, it does not have a sufficient basis to support a jury verdict against E&Y. Respect for the jury requires that it not be put through the empty exercise of a trial. Summary judgment is therefore warranted. See, *e.g.*, *Woldeamanuel*, 703 A.2d at 1245.

C. E&Y's Access To Confidential Records Did Not Create A Duty To Disclose The Moseley Discussions To VSA

Finally, there is no evidentiary or legal basis for concluding that E&Y owed a duty to identify and disclose the Moseley discussions based on its access to VSA's confidential business records. To begin with, E&Y has always recognized its duty not to misuse confidential information. E&Y was faithful to that duty – as VSA has conceded and as the Court has previously acknowledged. 10/13/00 Order at 4.

VSA seems to suggest that E&Y's mere access to confidential information limited its ability to continue confidential employment discussions with Moseley (we note again that it is undisputed that E&Y's discussions with Moseley began well before E&Y had a relationship of any sort with VSA). But saying something and proving it are two quite different things. And VSA has *no* evidence – let alone the requisite expert testimony concerning industry practices – that would permit a jury to find that mere access to confidential information imposed on E&Y any professional duty other than to refrain from misusing such information.

II. VSA UTTERLY FAILS TO IDENTIFY *ANY* EVIDENCE – MUCH LESS SUFFICIENT EVIDENCE – THAT E&Y ENTERED INTO A *FIDUCIARY* RELATIONSHIP WITH THE PLAINTIFF, AND THE RECENT DEPOSITION OF GERALD CASSIDY CONFIRMS THE POINT

This Court has already ruled – and correctly so – that an auditing relationship does not give rise to a fiduciary duty. 7/17/01 Order at 12. And, as we showed in our opening memorandum, the overwhelming weight of the evidence – indeed, *all* the evidence other than Mr. Van Scoyoc's own self-serving affidavit, submitted after the close of discovery – is that E&Y performed *only* auditing work on this transaction. Moreover, we contended, even if E&Y performed certain "consulting" or "due diligence" services, there is no support in the case law that "consulting work" (or "due

diligence" work, or any other synonym of plaintiff's choosing) gives rise to a fiduciary duty. Finally, we noted that if such types of *non*-auditing services could *ever* create a fiduciary duty, the duty could not possibly extend to the *target* of the due diligence (here, VSA), rather than to the *beneficiary* of the due diligence (here, Cassidy & Associates ("C&A")). VSA simply has no answer to these arguments. Indeed, as to most of them, it does not even try.

A. VSA Has Not Adduced Sufficient Evidence To Establish That E&Y Was Anything Other Than VSA's Auditor

Plaintiff searches in vain for *anyone* (other than Van Scoyoc himself) who believes that E&Y did something other than audit work on this transaction. Every document produced in discovery, and every piece of testimony obtained in discovery, established that E&Y served *only* as VSA's auditor. See E&Y Memo. at 23-24. Indeed, plaintiff does not even attempt to contradict the lengthy list of evidence presented in our opening brief, which shows – overwhelmingly – that E&Y performed only auditing services on the VSA acquisition.

The snippets plaintiff cites to the contrary are entirely weightless. Plaintiff first directs this Court (Opp. 19) to the affidavit of Gerald Cassidy, in which Cassidy referred to "consulting" work that E&Y was ostensibly hired to perform. Significantly, however, Cassidy did not identify in his affidavit any consulting work that E&Y actually *did* perform. (That is undoubtedly why plaintiff's own expert, Dan Guy, was unable to identify any "consulting" work that E&Y performed in this engagement – there just wasn't any. (Guy Tr. 154-55)). More critically, Cassidy has now been *deposed* – a deposition that took place more than a week before plaintiff filed its opposition – and has confirmed that E&Y served only as an auditor on this transaction. In particular, Cassidy testified that the draft engagement letter of E&Y by C&A, and the term sheet between C&A and VSA, *both* of

which defined E&Y's role only as that of an auditor (see Ex. 8 at EY000581, Ex. 5 at VSC00342), fully describe E&Y's role in the proposed transaction between VSA and C&A. Cassidy Tr. 77, 118-19, 123-24 (Ex. 1). These documents conclusively establish that E&Y's role was limited to auditing.

Plaintiff also cites (Opp. 19) a snippet from the deposition of John Hendrick, C&A's Chief Financial Officer, in which Hendrick purportedly stated that E&Y was performing "due diligence," in addition to its auditing function. But that's the trouble with snippets – they so often misdirect the eye. "Due diligence," as Mr. Hendrick understood it, is nothing more than "becoming familiar with the firm." Hendrick Tr. 32. And that task, Hendrick added, is *not* something separate and distinct from ordinary auditing work, but instead is conducted *in the course of performing the audit* – "in connection with the audit, they're obviously doing due diligence as well, * * * it kind of killed two birds with one stone." *Ibid.*

Finally, plaintiff contends that E&Y has "conceded" that it performed more than auditing work on this transaction – adding that it is "particularly disingenuous" to suggest otherwise. Opp. 19. What is "particularly disingenuous," however, is VSA's truly inexplicable rendering of the relevant material. Lest this canard survive one more round of briefing, we take the liberty of quoting the actual statements in greater detail. They appear at page 9 of E&Y's Reply Memorandum in support of its first motion for summary judgment. There, in listing various propositions on which the record was "undisputed," E&Y included the following point: "(5) *at most* E&Y provided audit and consulting services (VSA Statement [of Genuine Issues of Material Fact], Response No. 12, at 6)." (Emphasis added). E&Y's point – which seems obvious enough – is that, even according to *the plaintiff's* own Statement of Material Facts, the *most* E&Y can be said to have done is audit and consulting work. Only by working the English language past the breaking point can plaintiff construe

this as a concession by E&Y that it did, in fact, perform consulting work.

So where does that leave us? Precisely where we said we were: with Mr. Van Scoyoc as the sole witness for the proposition that E&Y performed anything more than auditing services. Under *D'Ambrosio* v. *Colonnade Council of Unit Owners*, 717 A.2d 356, 358 (D.C. 1998), that is not nearly enough to carry plaintiff's burden on summary judgment.

B. Even If E&Y Performed More Than Simply Auditing Work, Its Alleged Additional Services Do Not Give Rise To A Fiduciary Relationship With Anyone

Even if, as Van Scoyoc (uniquely) testified, E&Y *did* perform "consulting" or "due diligence" functions that were truly separate and distinct from auditing, none of those tasks gives rise to a fiduciary duty. As we showed in our opening brief (at 26-28), there is simply no support in the case law for a fiduciary duty on facts like these. For one thing, E&Y did not have the quality and quantity of interactions on the "due diligence" assignment necessary to create a fiduciary relationship. See *Steele* v. *Isikoff*, 130 F. Supp. 2d 23, 37 (D.D.C. 2000) (finding no fiduciary relationship as a matter of law where interactions between plaintiff and defendant took place over the course of several days). For another, the provision of advice, in and of itself, does not give rise to a fiduciary duty. See *Production Credit Ass'n* v. *Croft*, 423 N.W.2d 544, 548 (Wis. 1988). What is more, VSA had *its own* law firm, investment banker, and internal accountant advising VSA on the transaction. See *In re Apex Automobile Warehouse, L.P.*, 2000 WL 220497, at *10 (N.D. Ill. Feb. 18, 2000).

Plaintiff offers nothing but boilerplate responses. It tells us that "the definition of 'fiduciary relationship'" must be left "flexible" so that it may "fit new circumstances" as they arise. But even flexibility has its limits. The fact is, plaintiff has failed to identify a single case in which an auditor – even one that ostensibly provided "consulting" or "due diligence" services – has been held to be a

fiduciary of anyone. Nor does plaintiff improve its position by adding that E&Y was in a "relationship of trust and confidence" with VSA. Opp. 22. True enough, E&Y may have "had access to every item of confidential financial and operational information that VSA had." *Ibid.* But this argument obviously proves too much – *every auditor* has access to a company's confidential operational and financial information; but as this Court has already held, auditors are not fiduciaries of their clients. 7/17/01 Order at 12.

C. Even If The Purported Non-Auditing Services Could Ever Give Rise To A Fiduciary Duty, That Duty Would Run At Most To C&A, Not VSA

VSA has a third, independent hurdle to surmount in its effort to treat E&Y as a fiduciary: Assuming E&Y *did* perform non-auditing services, and assuming such services could *ever* give rise to fiduciary duties, those duties would run to C&A, *not* VSA. E&Y was hired by C&A, not VSA, for the purpose of helping to determine whether VSA was worth acquiring. Put another way, VSA was the *target* of E&Y's audit (and purported due diligence), not the *beneficiary*. Yet it is VSA, not C&A, that has brought this improbable lawsuit.

Mr. Cassidy emphatically confirmed in his deposition that E&Y's duties, as he saw them, ran exclusively to C&A. For example, Mr. Cassidy was asked whether it would be appropriate for E&Y to advise VSA that it could be sold for a higher price than C&A was willing to pay. Cassidy replied that E&Y could not so advise VSA because C&A – *not* VSA – had hired E&Y. Cassidy Tr. 44. Likewise, Cassidy explained, if E&Y had "run across problems in the books and records of Van Scoyoc Associates," he would have expected E&Y to notify C&A, not VSA, of this issue. *Id*. at 42. Similarly, if VSA's revenues had been less that what C&A believed them to be, E&Y would be required to tell C&A, not VSA, of this fact. *Id*. at 42-43. Cassidy would have expected E&Y to

notify C&A if VSA's "employees are unhappy and leaving," if VSA's "[c]lients are unhappy," and if VSA didn't "have good record keeping." *Id*. at 43. After all, Cassidy explained, C&A, not VSA, was paying for E&Y's services, and it was therefore C&A that had the claim on E&Y's duties (if any). *Id*. at 44-45. And, logically, E&Y could not have owed the "highest fidelity" to VSA – the touchstone of a fiduciary duty. *Urban Invs.* v. *Branham*, 464 A.2d 93, 96 (D.C. 1983).

* * *

For each of these three reasons – but certainly for all three in combination – VSA's fiduciary breach claim should be dismissed. E&Y served *only* as an auditor; even if it performed *non*-auditing work, any such additional duties do not give rise to a fiduciary relationship; and assuming a fiduciary relationship could ever arise, it would extend only to C&A, not to the plaintiff.

III. VSA IS NOT ENTITLED TO RECOVER ANY DAMAGES ON ACCOUNT OF THE DEPARTURE OF PHILLIP MOSELEY FROM VSA

The single biggest component of damages alleged in this case – and the principal reason why this Court's well-warranted efforts to suggest a settlement did not succeed – is VSA's demand to be compensated because of Phillip Moseley's departure from the firm. Plaintiff seeks these "Moseley damages" on both of its remaining claims. But as we showed in our opening brief (at 13-20), these damages are flatly precluded under well-settled principles of proximate case. Moreover, with regard to the negligent misrepresentation claim, the Moseley damages are unavailable as a matter of law.

A. VSA Concededly Has No Evidence On More Than One Link In Its Chain Of Causation

Plaintiff does not dispute that, in order to recover damages resulting from Moseley's departure, it must establish the specific chain of events that we identified in our opening memorandum. Now that plaintiff's opposition is in, there is just no disputing the bottom line:

Plaintiff lacks *any* evidence on several of the links in the chain of causation. Here are the three weakest links – on each of which plaintiff has nothing material to say.

1. Plaintiff has *no* evidence that E&Y would have acceded to a request that it stop soliciting Moseley. Although plaintiff had a full and fair opportunity to depose E&Y's employees, it was unable to adduce a single drop of evidence that E&Y would have agreed to stop talking to Moseley had VSA or C&A asked it to. As a matter of fact, Cassidy has now acknowledged (in his deposition) that E&Y likely would *not* have acceded to such request, had one been made. Cassidy Tr. 74. And that is hardly surprising because, as the evidence shows, E&Y did *not* believe (and still does not believe) that it labored under any conflict of interest; thus, had it been asked to drop the Moseley solicitation, it doubtless would have refused.

Thus, even if the burden of proof fell to E&Y to *disprove* that it would have acceded to a request to stop soliciting Moseley, it would have carried that burden on the present record. But of course, the burden under *Celotex* v. *Catrett Corp.*, 477 U.S. 317, 323 (1986), belongs entirely to VSA. It is VSA that must affirmatively prove that E&Y would have listened had it been asked to cease its discussions with Moseley. VSA's assertion that "E&Y offers no admissible evidence" (Opp. 17) on this issue is thus not only false, but irrelevant: The burden is all plaintiff's to bear. Plaintiff has no such evidence, and does not even pretend it does.

2. Plaintiff has failed to adduce *any* evidence that Moseley would have stayed at VSA had he not been solicited by E&Y. VSA contends (Opp. 17) that Moseley never took affirmative steps to leave VSA prior to his discussions with E&Y. Opp. 17. But, in light of the *undisputed evidence* that Moseley was unhappy at VSA (Kelly Tr. 48-49), that Moseley was considering other offers (Van Scoyoc Tr. 129), and that Moseley had decided to leave VSA by the end of 1998

(Moseley Tr. 33, 43), it is simply beside the point that Moseley had not yet taken "affirmative steps" before E&Y approached him. Where is the proof that Moseley would have stayed? There isn't any.

So what does plaintiff do? It argues, once again, that *E&Y* has "fail[ed] to produce any evidence" that Moseley would have left VSA, and that "it is unlikely that the jury will accept E&Y's conjectures." Opp. 17. But that again misapprehends the burden of proof. Bereft of actual evidence, VSA simply wants this Court to allow "conjecture" to obviate plaintiff's burden to adduce evidence. The law of summary judgment does not permit that: "[T]he obligation to draw reasonable inferences in favor of the opposing party does not mean that the Court must assume facts that are unsubstantiated or that the Court must fill in blanks where no evidence exists." *In re Hodges*, 756 A.2d 389, 393 (D.C. 2000).

3. Plaintiff offers *no* evidence that Moseley would have stayed at VSA for another three years. VSA contends, again, that Moseley did not take affirmative steps towards leaving VSA, (Opp. 18), but that tepid claim cannot carry VSA's burden of proof in light of *unrebutted* testimony that Moseley had decided to leave the firm, and that he was listening to other offers. Nor does plaintiff carry its burden by pointing to *other* VSA employees who stayed at the firm for three or more years. They are not Moseley – and their career choices are simply irrelevant.

The chain of causation breaks at *each* of these links, and others. And it would be profoundly unfair to send this causation theory to the jury so that it can fill in – by speculation and caprice – the enormous gaps in plaintiff's proof. The Moseley damages should be taken off the table.

B. VSA Misapprehends The Case Law On "Benefit-of-the-Bargain" Damages Under The Tort Of Negligent Misrepresentation

Although plaintiff was quick to avail itself of this Court's invitation to add a claim for

negligent misrepresentation, it is unwilling to accept the well-settled limitation, under the Restatement of Torts, on the damages that are recoverable under that cause of action. Section 552B unambiguously provides that the remedy for the tort of negligent misrepresentation is "out-of-pocket" damages only; so-called "benefit-of-the-bargain" damages are not available. See Restatement (Second) Torts § 552B (damages available on negligent misrepresentation claim are limited to "pecuniary losses * * * suffered as a consequence of plaintiff's reliance on the misrepresentation").

Plaintiff does not point to a *single case* involving negligent misrepresentation under Section 552 of the Restatement in which benefit-of-the-bargain damages were awarded. Indeed, VSA principally relies on an *intentional fraud* case – *Espaillat* v. *Berlitz Schools*, 127 U.S. App. D.C. 293, 383 F.2d 220 (1967) – but plaintiffs in intentional fraud cases are entitled to both out-of-pocket and benefit-of-the-bargain damages. See Restatement (Second) Torts § 549(2) ("The recipient of a fraudulent misrepresentation in a business transaction is also entitled to recover additional damages sufficient to give him the benefit of his contract * * * .")

Plaintiff also chastises E&Y (Opp. 13) for having "omitted" the Minnesota decision in *Lewis* v. *Citizens Agency of Madelia, Inc*, 235 N.W.2d 831 (Minn. 1975), when we asserted that "every state" adheres to the distinction drawn in Section 552 between "out-of-pocket" and "benefit-of-the-bargain" damages. VSA neglects to mention, however, that *Lewis* was *not* brought under the Restatement; indeed, the Restatement was not even mentioned in the court's opinion, nor, so far as we can tell, in either party's argument.[2] As for *Trytko* v. *Hubbell, Inc.*, 28 F.3d 715, 722 (7th Cir.

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[2] Plaintiff therefore plainly misstates the case when it claims (Opp. 13) that the defendant in *Lewis* argued that certain damages were not available under the Restatement. Although the defendant did argue for such a limitation on damages, it did not cite the Restatement in doing so. 235 N.W.2d at 835.

1994), the court explicitly held in that case that "the Restatement adopts the 'out-of-pocket' rule as the appropriate measure of damages for negligent misrepresentation and specifically excludes 'benefit-of-the-bargain' damages."

In light of this black letter limitation, plaintiff cannot obtain the "Moseley damages" under its negligent misrepresentation claim. However hard plaintiff tries, the Moseley damages cannot fairly be characterized as "out-of-pocket." In sharp contrast to other types of damages sought in this case – which are genuinely out-of-pocket (see Am. Cplt. ¶ 63; Van Scoyoc Aff. ¶¶ 20-21) – plaintiff seeks the Moseley damages on a purely "expectancy" theory: it asks this Court (or a jury) to award it the money it expected to make if E&Y's implicit representation – "we are not soliciting your employee Moseley" – were true. This is precisely the type of recovery forbidden by the Restatement. "[T]here is as a general rule no liability for merely negligent conduct that interferes with or frustrates * * * an *expectancy* of pecuniary advantage." Rest. § 552B *comment b* (emphasis added).

CONCLUSION

For the foregoing reasons, summary judgment should be granted in E&Y's favor (i) as to Count V, dismissing the claim in its entirety, or, in the alternative, dismissing all damages arising from Phillip Moseley's departure from VSA; and (ii) dismissing Count II in its entirety, or, in the alternative, dismissing all damages arising from Phillip Moseley's departure from VSA.

Oral Hearing Requested

Dated: October 15, 2001

Respectfully submitted,

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Lawrence S. Robbins

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2001, I served a true and correct copy of the Reply Memorandum in Support of Defendant Ernst & Young, LLP's Motion for Summary Judgment by facsimile and first-class mail:

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